In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 32

JAMES R. HOFFA, PETITIONER

v.

UNITED STATES

No. 33

THOMAS EWING PARKS, PETITIONER

v.

UNITED STATES

No. 34

LARRY CAMPBELL, PETITIONER

v.

UNITED STATES

No. 35

EWING KING, PETITIONER

v.

UNITED STATES

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITIONERS' "MOTION FOR RELIEF"

On December 12, 1966, this Court affirmed petitioners' convictions on two counts of an indictment charging endeavors to bribe jurors in a federal

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criminal trial. On January 26, 1967, within the time, as extended, in which petitions for rehearing might be filed, petitioners filed a "Motion For Relief" requesting that the government respond to certain allegations and that the judgments of affirmance be vacated. The motion is based on charges that government agents or persons acting at their behest engaged in electronic eavesdropping and wiretapping prior to and during petitioners' trial. Appended thereto are affidavits which make certain factual assertions regarding government conduct during the trial and *vis-à-vis* petitioner Hoffa generally.

1. We stress at the outset that factual allegations of matters outside the record impugning the fairness of a criminal trial which has been sustained on appeal are inappropriate for presentation to an appellate court. Rule 33 of the Federal Rules of Criminal Procedure and 28 U.S.C. 2255 afford full and adequate remedies in a district court for any convicted defendant who alleges that he has newly discovered evidence which bears upon the fairness of his conviction or who challenges the constitutionality of the proceedings which led to that judgment.

It is of course well settled that appellate courts will not look to matters *dehors* the record presented by an appellant for the first time on appeal. *E.g.*, *Cuicci* v. *Illinois*, 356 U.S. 571; *Moore* v. *United States*, 359 F. 2d 852 (C.A. 5); *Ellis* v. *United States*, 353 F. 2d 402 (C.A. 8); *United States* v. *Collins*, 349 F. 2d 296 (C.A. 6); *Rivera* v. *United States*, 318 F. 2d 606 (C.A. 9); *United States* v. *Helwig*, 152 F. 2d 456 (C.A. 3), vacated on other grounds, 328 U.S.

820. This is particularly true when, as here (pp. 7-9, *infra*), the allegations made by the accused are denied by the government. Issues of credibility are presented, and these can most suitably be resolved in a district court where, if necessary, live witnesses may be called upon to testify.

Nor, we submit, are the affidavits filed here of a kind which may be taken at face value by an appellate court. It is relevant, in this regard, to observe that the present challenge is the fourth collateral attack petitioners have made on the validity of their convictions. In their first motion for a new trial, filed shortly after the return of the verdict in March 1964, petitioners submitted affidavits by employees at the hotel where the jury was sequestered alleging that there was excessive drinking and intoxication by the marshals and jurors. Counter-affidavits filed by the government established, to the satisfaction of the trial judge, that "bellboys were offered or received large sums of money to give affidavits charging misconduct upon the part of marshals and jurors." *United States* v. *Hoffa*, 247 F. Supp. 692, 701 (E.D. Tenn.).

After the district court denied a second motion for a new trial (now pending on appeal) and one month after the court of appeals' affirmance of petitioners' convictions and of the denial of the first motion for a new trial, petitioners filed a third such motion. In support of that motion they submitted affidavits alleging that the district judge had expressed a bias against petitioner Hoffa to a prostitute in a Chattanooga hotel and that the marshals who had custody of the jurors at the hotel where they were sequestered

had furnished and paid for prostitutes for the male jurors. Counter-affidavits by the jurors and marshals denying these allegations were submitted by the government. The district judge found that petitioners' motions were legally insufficient and that their factual allegations were untrue. As to the affidavit charging him with misconduct, he stated that it was "a complete and total fabrication and fraud" and that "patent perjury" had been committed. *United States* v. *Hoffa*, 245 F. Supp. 772, 774, 778 (E.D. Tenn.).

One of the most extensive affidavits now submitted by petitioners makes explicit reference to a "reward" which is said to be "only a partial reason for the giving of this affidavit" (Pet. Motion 7a). The "reward" referred to is obviously the $225,000 bounty publicly offered on petitioner Hoffa's behalf to anyone who would provide information that government eavesdropping or wiretapping took place during his trial.[1] In these circumstances and against the background of petitioners' prior collateral challenges to their convictions, there is every reason to view petitioners' affidavits with skepticism.

2. At all events, it appears plain that petitioners are not entitled, at this juncture, to delay the entry of final judgment on account of their present allegations. Petitioners contend that even if their allegations are denied in this Court, the judgments of affirmance should be vacated and the case remanded for a hearing in the district court. But this proce-

[1] *N.Y. Times*, December 15, 1966, p. 40C, col. 7; *Washington Star*, July 31, 1966, p. A-19, cols. 5-8; *Chattanooga Times*, December 31, 1966, p. 1.

dure would have precisely the undesirable consequences which the present Rule 33 of the Federal Rules of Criminal Procedure was designed to avoid. That rule provides that a motion for a new trial may be filed in the district court while an appeal is pending, and that a remand of the case is required only if the district court wishes to grant the motion. Before the adoption of the rule, appellants were able to delay the entry of final judgments by requesting remands to district courts for the purpose of presenting allegedly newly discovered evidence. In *United States* v. *Johnson*, 327 U.S. 106, this Court noted the substantial possibilities of abuse inherent in such a procedure (327 U.S. at 112–113):

> Determination of guilt or innocence as a result of a fair trial, and prompt enforcement of sentences in the event of conviction, are objectives of criminal law. * * * [M]otions for new trial on the ground of newly discovered evidence * * * can, under Rule II(3) [of the former Criminals Appeals Rules], be made at any time within sixty days after judgment, and in the event of an appeal, at any time before disposition by the appellate court. * * * It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences. * * * While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. * * *

If affidavits of the kind filed here entitled petitioners to delay the "prompt enforcement of sentences," they could indefinitely postpone serving their

terms of imprisonment by filing a series of affidavits alleging government misconduct or other evidence said to be "newly discovered." Such delay is not, we submit, consistent with the legitimate "objectives of criminal law."

We note in this connection that allegations of government eavesdropping and wiretapping were made repeatedly by petitioners in the district court [3] and that petitioners were afforded a full opportunity, during and after their trial, to substantiate allegations similar in kind to those they now make here. In the course of a post-trial hearing which lasted three trial days, petitioners called to the witness stand various F.B.I. agents and their own electronics expert, affiant Bernard B. Spindel.[4] At the conclusion of the hearing, the district judge found that

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[3] The allegations were repeatedly denied by government counsel. On one occasion, in response to such an allegation, government counsel responded (Tr. 760):

"In any event, the government states emphatically, categorically, without any reservation, no phones are being tapped, no counsel is being surveilled, and no defendant is being surveilled by any agency of the federal government."

[4] Spindel testified that he had been employed by one of defense counsel to come to Chattanooga "to make a survey to determine if there was any surveillance of the defendants, their counsel or their staff here in the City of Chattanooga" (Tr. 9056), that he had, with the aid of his eavesdropping-detection equipment, made a thorough "physical inspection" of the hotel premises in a search for microphones and transmitters and that he had examined the telephone cables and terminal box in the basement of the hotel (Tr. 9058–9065). He failed to testify that he had discovered any evidence of eavesdropping on the hotel premises or wiretapping on its telephones during this search, even though petitioners' affiant Nichols alleges that he placed transmitters on those premises and that he installed wiretapping equipment in that basement (Pet. Motion 4a–6a).

> "* * * the evidence wholly fails to establish any surveillance by government agents of the defendants, their attorneys, or of a single witness in the case. There was no evidence of any interference by the Government with the defendants' rights as alleged in their respective motions. There was no evidence of any interference with any defendant's right to counsel or with any defendant's right to consult with his counsel and prepare and present his case, nor with the right of any defense counsel in this respect, nor with respect to any witness.

The court of appeals determined, upon an examination of the record, that these findings "were supported by substantial evidence and are not clearly erroneous." 349 F. 2d at 39. Petitioners' present motion makes essentially the same kind of allegation made in the district court and obviously warrants no additional delay.

3. Although we believe that no response to petitioners' factual allegations are required in this Court, we are mindful of the fact that the charges being made, if true, would reflect on the integrity of those who share responsibility in the administration of criminal justice in the federal courts. We are denying the allegations at this juncture, therefore, not because a defendant has any right to demand in an appellate court that the government answer allegations of this or any other kind pertaining to matters *dehors* the record, but merely to assure the Court that this sweeping and publicized attack on the integrity of this prosecution is, so far as we can determine, totally without basis in fact.

The essence of petitioners' allegations is that their trial was rendered unfair by unlawful government eavesdropping and wiretapping. We advised this Court in our Supplemental Memorandum in *Schipani v. United States*, No. 504, this Term, rehearing granted and judgment vacated, December 12, 1966, that an extensive review has been undertaken by the Department of Justice "in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial" and that it is the policy of the Department "promptly [to] notify the appropriate court when any material discovery is made." *Id.* at 5. That review procedure was undertaken with regard to these cases well before the filing of petitioners' motion, and we have made no notification to this Court because our inquiry has produced no information lending any support whatever to a claim that electronic eavesdropping or wiretapping affected petitioners' convictions.

Since the filing of petitioners' motion and attached affidavits, we have conducted additional investigations concerning the specific allegations contained therein. We have, in this inquiry, gathered affidavits and other evidence which may be presented to a district court when and if petitioners' allegations are made in that forum. We are not detailing that evidence here because, for the reasons previously stated, we believe it would be inappropriate to do so. We do represent to this Court, however, that our inquiry has established that the relevant allegations made by petitioners' affiants, including specifically affiants Nichols, Loeb, Davidson, Frazier, Paden, Cole and Quaglia, which

charge or suggest that there was electronic eavesdropping or wiretapping by agents of the federal government (or at their request) on petitioners' premises or telephones, on the premises or telephones of their attorneys, or on the premises occupied or the telephones used by the jury, are without any foundation in fact.

For the foregoing reasons, we respectfully submit that there is no occasion to disturb this Court's affirmance of petitioners' judgments of conviction and that the motion for relief should be denied.

THURGOOD MARSHALL,
Solicitor General.

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